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HYUNDAI MOTOR AMERICA

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

FAIRFIELD IMPORTS THREE, LLC, a
California Limited Liability Company,

Protestant,

v.

HYUNDAI MOTOR AMERICA, a California
Corporation,

Respondent.

Protest Nos.: PR-2582-18 and PR-2583-18

**RESPONDENT HYUNDAI
MOTOR AMERICA'S REPLY IN
SUPPORT OF MOTION TO
DISMISS PROTESTS**

1 **I. INTRODUCTION**

2 Protestant has failed to present a single piece of evidence to contest that good cause exists
3 to terminate Protestant or to contest that the California New Motor Vehicle Board (“Board”) has
4 the authority to summarily dismiss the Protests¹. Protestant has not offered and cannot offer any
5 evidence to refute that it (i) closed its Hyundai dealership and ceased selling and servicing
6 Hyundai vehicles in November 2018 and has been closed since that time, (ii) lost its line of
7 wholesale financing and has no ability to purchase new vehicles, (iii) does not have a valid new
8 motor vehicle dealer occupational license from the California Department of Motor Vehicles
9 (“DMV”), (iv) does not have any remaining new vehicle inventory, (v) currently is not selling or
10 servicing Hyundai vehicles or otherwise serving the public in Fairfield, California, and, finally,
11 (vi) does not have *any* viable plans to re-open or resume operations of the Hyundai dealership at
12 its authorized location.

13 Protestant’s motive is clear – these Protests are merely a delay tactic, and Protestant
14 implores the Board to deny Respondent Hyundai Motor America’s (“HMA”) Motion to Dismiss
15 in order to protect Mr. Hassanally’s investment and allow Protestant an indefinite amount of time
16 to attempt to sell its Hyundai dealership (an admission that Protestant, itself, has no plans to re-
17 open or resume operations). Contrary to Protestant’s assertion, permitting the Protests to
18 continue will not protect Protestant’s investment in the Hyundai dealership, as Mr. Hassanally is
19 the one who unilaterally and voluntarily decided to close the Hyundai dealership in November
20 2018, nearly five months ago. There is no dispute that Protestant has gone out of business, and
21 there is no relief the Board could grant – whether at this stage or after a full merits hearing –
22 which could result in Protestant resuming operations. Therefore, for the reasons set forth below
23 and in its moving brief, HMA requests that the Board dismiss the Protests with prejudice.

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¹ Protest Nos. PR-2582-18 and PR-2583-18 have been consolidated by the Board.

1 **II. THE UNDISPUTED RECORD ESTABLISHES THAT GOOD CAUSE EXISTS**
2 **TO TERMINATE PROTESTANT AND A MERITS HEARING ON THE**
3 **PROTESTS WOULD BE FUTILE**

4 **A. Protestant Has Failed to Proffer Any Credible Evidence to Refute that Good**
5 **Cause Exists to Terminate Protestant**

6 Protestant does not dispute any of the following facts, all of which collectively establish
7 that there is good cause to terminate Protestant as a matter of law:

- 8 • Protestant closed the doors at its Hyundai dealership on November 16, 2018
- 9 • Protestant placed a sign on the doors of its Hyundai dealership that indicated that
10 Protestant was “CLOSED” and “OUT OF BUSINESS”
- 11 • Protestant ceased its sales operations in November 2018
- 12 • Protestant ceased its service operations in November 2018
- 13 • HMA issued a Notice of Termination Due to Cessation of Business Operations
14 (“Notice of Termination”) to Protestant on or about November 30, 2018
- 15 • Protestant’s Hyundai dealership was closed for more than seven (7) consecutive
16 days prior to HMA issuing a Notice of Termination to Protestant
- 17 • The Notice of Termination complied with the requirements of section 3060 of the
18 California Vehicle Code
- 19 • Protestant lost its line of wholesale financing in November 2018 and has not
20 restored or replaced the line of wholesale financing
- 21 • Protestant remains without wholesale financing to this day
- 22 • Protestant’s occupational license as a new motor vehicle dealer in California is
23 “not valid”
- 24 • BMO Harris Bank, N.A. (“BMO”), the secured lender who formerly provided
25 Protestant’s line of wholesale financing, has filed a lawsuit against Protestant,
26 seeking to recover more than \$16 million
- 27 • BMO has foreclosed on certain of its collateral interests, including on the new
28 vehicle inventory that was present at Protestant’s Hyundai dealership at the time of
the dealership’s closure and for which BMO had formerly provided the wholesale
financing
- Protestant is not conducting an adequate amount of business, or any business at all,
in Fairfield, California, and has not done so since closing the dealership in
November 2018
- Protestant is not conducting any sales business in Fairfield, California
- Protestant has not had any employees in its Sales Department since November
2018

- 1 • The last time that Protestant ordered a new Hyundai vehicle from HMA was in
2 September 2018
- 3 • Protestant's last sale of a new Hyundai vehicle was reported sold to HMA on
4 November 4, 2018
- 5 • Protestant has no remaining new vehicle inventory
- 6 • Protestant is not conducting any service business in Fairfield, California
- 7 • Protestant has not had any employees in its Service Department since November
8 2018
- 9 • The last warranty repair completed on a Hyundai vehicle by Protestant was on
10 November 13, 2018
- 11 • Protestant submitted its last warranty claim to HMA on November 14, 2018
- 12 • Rahim Hassanally (sole member of Protestant) and/or Momentum Auto Group (an
13 affiliate of Protestant) sold the real property upon which Protestant's Hyundai
14 dealership is located to an unaffiliated real estate investment trust ("REIT"),
15 Pontus REIT
- 16 • The REIT has not received any rent from Protestant or its affiliated dealerships
17 since their closure and has threatened to commence eviction proceedings against
18 Protestant and its affiliated dealerships
- 19 • Protestant now has been closed for more than 145 days and has never re-opened
20 once since its closure in November 2018
- 21 • Protestant has not taken any steps to re-open the Hyundai dealership in Fairfield,
22 California since its closure in November 2018 and has no intention to re-open the
23 Hyundai dealership in Protestant's name

24 *See* Declaration of Joyce Kennaday dated February 25, 2019 and Declaration of Richard H.
25 Otera dated February 25, 2019 and exhibits attached thereto. The undisputed facts clearly
26 establish that Protestant has failed to comply with material obligations under its Hyundai Dealer
27 Agreement, including but not limited to, by losing its line of wholesale financing, by closing its
28 doors and failing to provide any sales or service business, by failing to safeguard and promote
the reputation of Hyundai products and HMA, and by failing to promote and sell Hyundai
products. As such, summary termination of Protestant's Dealer Agreement is both proper and
just.

Recognizing that it has no basis to challenge any of the twenty-six (26) undisputed facts
identified above, Protestant instead offers two specious "facts" as to why good cause for
termination supposedly does not exist: (a) Mr. Hassanally's purported investment of \$3.5 million

1 in Protestant, and (b) the contention of Mr. Issa, who was just appointed by the court as the
2 receiver of Protestant in March 2019, that he has solicited interest from unnamed individuals
3 about the potential purchase of the Hyundai dealership. However, Mr. Hassanally's investment
4 is unsubstantiated by any verifiable evidence. Protestant did not submit any documents or other
5 proof regarding the amount of Mr. Hassanally's investments, which according to Mr. Hassanally,
6 includes the real property that he had already sold to a REIT in or around 2016. Protestant
7 further failed to submit any evidence that any investments previously made by Mr. Hassanally
8 remain in place and have not been spent, foreclosed upon, or are otherwise available to
9 Protestant at this time, a critical omission given the multiple secured and unsecured creditors
10 pursuing Mr. Hassanally for unpaid debts.

11 In addition, the purported sale of Protestant to a potential purchaser is uncertain and
12 speculative at best. All Mr. Issa can claim is he has "received offers and have had other parties
13 express interest" and that he believes that there will be a goodwill payment made for Fairfield.
14 Protestant has not otherwise put forth any evidence of a purchase agreement, letter of intent, or
15 any other documentation (or alleged offers) regarding the potential sale of Protestant. More
16 importantly, however, the facts offered by Protestant do nothing to meaningfully contest the
17 litany of undisputed facts offered by HMA showing that good cause exists to terminate
18 Protestant. Protestant does not contest that it has closed its doors and ceased all operations at its
19 Hyundai dealership, ceased serving the public in Fairfield, has not re-opened its Hyundai
20 dealership, and has no viable plans to re-open its Hyundai dealership *in Protestant's name*.

21 As explained in HMA's moving brief, the undisputed facts presented by HMA
22 conclusively establish that (i) Protestant is not conducting an adequate amount of business, or
23 any business at all, as compared to the business available to Protestant; (ii) Protestant has not
24 made the investment or incurred the obligations necessary to perform its part of the Hyundai
25 franchise; (iii) to the extent that Protestant has made an investment, the investment was not
26 permanent; (iv) it would not be injurious to the public if Protestant is replaced, as its Hyundai
27 dealership has been closed for nearly five months; (v) Protestant does not have adequate motor
28 vehicle sales and service facilities, equipment, vehicle parts, or qualified service personnel to

1 reasonably provide for the needs of the consumers and is not rendering adequate or any services
2 to the public; (vi) Protestant has failed to fulfill the warranty obligations of HMA to be
3 performed by Protestant; (vii) Protestant has failed to comply with the terms of the Hyundai
4 Dealer Agreement; (viii) Protestant has remained closed for business for nearly five months with
5 zero indication that it can re-open due to its insurmountable debt and involvement in litigation by
6 secured creditors. Thus, dismissal of the Protests is warranted.

7 **B. There Is No Reason or Need for the Board to Conduct a Full Merits Hearing**
8 **Because No Evidence Can Be Developed Between Now and a Hearing That**
9 **Would Change The Fact That Protestant Closed for Business for More Than**
10 **Seven Days, Remains Closed to This Day, and Has No Realistic Plans to Re-**
11 **Open Its Hyundai Dealership .**

12 Overlooking the holdings in *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104
13 Cal.App.4th 626 and *In the Matter of the Protests of Porter Auto Group, L.P. v. FCA US LLC*,
14 Protestant contends in its Opposition that “discovery should proceed,” that “a protest may only
15 be overruled after consideration of all relevant evidence,” and that the “Board should consider
16 the evidence that is developed at a hearing to determine whether [HMA] has established good
17 cause to terminate.” Opp. at p. 5. Protestant is wrong. Where, as here, the indisputable facts
18 show good cause for termination as a matter of law and that the dealer has no viable basis for
19 refuting that there is good cause, there is no point to conducting an evidentiary hearing on issues
20 of whether the dealer was performing its obligations under the dealer agreement or adequately
21 providing for the needs of the public, and dismissal of the Protest is warranted. *See Duarte*, 104
22 Cal.App.4th at 637, 641.

23 Moreover, there is no reason for an evidentiary hearing because there is no amount of
24 time needed for the parties to develop additional facts and put forth additional evidence in order
25 for the Board to determine whether good cause for termination exists. No new facts can or will
26 be established by Protestant. Protestant’s Opposition was its opportunity to refute that there is
27 good cause for termination, and Protestant submitted nothing of consequence. All that Protestant
28 has offered is that Mr. Hassanally purportedly invested \$3.5 million in Protestant, and that Mr.
Issa, who was just recently appointed by the court as the receiver of Protestant in March 2019,
has had discussions with unverified individuals about the potential purchase of Protestant. And

contrary to Protestant’s presumption, the question here is not whether a wholly unrelated third-party may at some point, and only if approved by HMA, be able to open a new Hyundai dealership in Fairfield, California. The pertinent question, rather, is whether Protestant, *i.e.*, Fairfield Imports Three, LLC, has any viable plans to re-open its Hyundai dealership in Fairfield, California – not a third-party buyer. *See Powerhouse Motor Sports Group, Inc. v. Yamaha Motor Corporation* (2013) 221 Cal.App.4th 867, 875 (in granting Yamaha’s motion to dismiss the Protest as untimely, the Board “concluded that Yamaha had the burden of establishing it had a good faith belief that Powerhouse had gone out of business, and ***that Powerhouse would not reopen the business even if the dealership were sold to MDK***” (emphasis added)). And the answer to that question is a resounding “no.”

Finally, even if Protestant submitted actual evidence of a buy-sell – which it has not – the entire premise of a buy-sell or a potential buy-sell is that the dealership will end up being opened by an entirely different operator. Not only is the approval of a buy-sell outside of the relief that the Board can provide to Protestant, but Protestant’s reliance on the prospect of a buy-sell is an admission by Protestant that Protestant cannot operate the Hyundai dealership and has no realistic plans to re-open its Hyundai dealership at its authorized location in Fairfield, California. Protestant in effect has conceded that a merits hearing on the Protests would be futile.

No matter how much time passes, how much discovery is conducted, or whether the Board permits the Protests to go to hearing, Protestant will never be able to conjure evidence to refute that it (i) closed its Hyundai dealership in November 2018, (ii) lost its line of wholesale financing in November 2018, (iii) ceased selling and servicing Hyundai vehicles in November 2018, (iv) does not have a valid new motor vehicle dealer occupational license from the DMV, (v) does not have any remaining new vehicle inventory; (vi) currently is not selling or servicing Hyundai vehicles or otherwise serving the public in Fairfield, California, and (vii) does not have viable plans to re-open or resume operations of the Hyundai dealership at its authorized location. The fact remains that no order of the Board could result in **Protestant** resuming operations as a Hyundai dealership. Permitting the Protest to continue and allowing Protestant an indefinite amount of time to attempt to sell its Hyundai dealership (all while the public continues to suffer

1 harm), would render meaningless the statutory scheme permitting termination of a dealership
2 following its closure for seven consecutive days. Consequently, a hearing on the Protests would
3 be futile and a waste of the Board's resources, and summary dismissal of the Protests is
4 appropriate.

5 **C. *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation Is***
6 ***Inapposite and Protestant's Reliance On It Is Misplaced***

7 In its Opposition, Protestant contends that *Powerhouse Motor Sports Group, Inc. v.*
8 *Yamaha Motor Corporation* (2013) 221 Cal.App.4th 867 stands for the proposition that "a dealer
9 not in operation continues to enjoy the protections of the Vehicle Code" and the "closure of the
10 dealership is not an event that as a matter of law precludes consideration of evidence going to the
11 good cause factors." Opp. at p. 4. Protestant's interpretation of *Powerhouse* is misguided, as
12 *Powerhouse* is clearly distinguishable from the instant case for several reasons.

13 *First*, *Powerhouse* is a decision by the California Court of Appeal, not the Board, and the
14 issue presented on appeal in that case was not whether the Board has the authority to summarily
15 dismiss a protest without a full merits hearing where good cause for termination has been
16 established. Rather, the issue before the Court of Appeal in *Powerhouse* was whether the
17 Board's decision terminating the dealer's dealer agreement based on the untimeliness of the
18 dealer's protest precluded the dealer from bringing a civil action in state court asserting statutory
19 and common law claims.

20 *Second*, the dealer in *Powerhouse* had filed a civil action against the manufacturer in state
21 court and sought damages in connection with the dealer's causes of action for violation of
22 section 11713.3 of the California Vehicle Code, intentional interference with contractual
23 relations, intentional interference with prospective business advantage, and breach of contract
24 and the covenant of good faith. Here, in contrast, Protestant has filed a protest with the Board
25 and has not asserted any claims for damages, as the Board does not have the authority to award
26 damages. *See Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 595
27 ("Furthermore, there is no statutory authority for the Board to award damages"); *Duarte*, 104
28 Cal.App.4th at 638 (citing *Hardin*, 52 Cal.App.4th 595).

1 *Third, Powerhouse* and the instant matter are factually dissimilar. In *Powerhouse*, the
2 plaintiff-dealer had executed a formal agreement for the sale of the dealership to the purchaser
3 prior to the manufacturer issuing a Notice of Termination to the dealer. Here, as Protestant
4 admits, there is no formal agreement for the sale of Protestant's Hyundai dealership and the
5 potential buy-sell is highly uncertain. And even if Protestant does eventually execute a formal
6 agreement for the sale of its Hyundai dealership after some indefinite amount of time – which it
7 has not – HMA issued the Notice of Termination to Protestant over 145 days ago, well in
8 advance of any speculative sale of Protestant's Hyundai dealership. Accordingly, even if a buy-
9 sell is signed, the proposed buyer could not purchase a going concern or anything even close.
10 Protestant has not only been closed for months – a period of time far exceeding the seven (7)
11 consecutive days stated in Vehicle Code Section 3060, authorizing termination – but it also has
12 no new vehicle inventory, has a multitude of creditors which it cannot satisfy, and faces the
13 threat of eviction from the dealership premises. All that Protestant currently has to sell, if
14 anything, is a dealership subject to an incurable and irrefutable notice of termination.

15 *Fourth and finally*, in the underlying Board action in *Powerhouse*, the manufacturer had
16 moved to dismiss the protest on the grounds that the protest was untimely, and therefore the
17 parties did not submit evidence and the Board had no occasion to evaluate whether the
18 undisputed facts established that good cause for termination of the dealer existed.

19 Put simply, *Powerhouse* has no application here and does not prevent the Board from
20 dismissing the Protests when HMA has submitted evidence establishing that good cause exists
21 for terminating Protestant.

22 **III. CONCLUSION**

23 As demonstrated above and in HMA's moving brief, the indisputable facts demonstrate
24 that good cause for termination exists as a matter of law and that Protestant has not refuted and
25 cannot refute that there is good cause for termination. The indisputable facts are such that there
26 is no relief available before the Board, and consequently, going to a merits hearing to determine
27 whether there is good cause to terminate the franchise would be an exercise in futility and a
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1 waste of public funds and the Board's resources. For these reasons, HMA respectfully requests
2 that the Board dismiss the Protests with prejudice.

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5 Dated: April 10, 2019

Respectfully submitted,

6
7 NELSON MULLINS RILEY & SCARBOROUGH LLP

8 By: 

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10
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HYUNDAI MOTOR AMERICA
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PROOF OF SERVICE

I, Emi Wakiya, declare as follows:

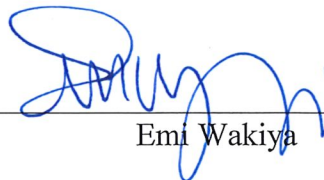
I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is 19191 South Vermont Ave., Suite 900, Torrance, California 90502. On **April 10, 2019**, I served the within:

**RESPONDENT HYUNDAI MOTOR AMERICA'S REPLY IN SUPPORT OF
MOTION TO DISMISS PROTESTS**

on the interested parties in this action addressed as follows: **SEE ATTACHED SERVICE LIST**

- ☒ **(BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Nelson Mullins Riley & Scarborough LLP following ordinary business practice. I am readily familiar with the practice at Nelson Mullins Riley & Scarborough LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.
- ☐ **(BY OVERNIGHT MAIL)** By placing such document(s) in a sealed envelope, for collection and overnight mailing at Nelson Mullins Riley & Scarborough LLP following ordinary business practice. I am readily familiar with the practice at Nelson Mullins Riley & Scarborough LLP for collection and processing of overnight service mailing, said practice being that in the ordinary course of business, correspondence is deposited with the overnight messenger service, Federal Express, for delivery as addressed.
- ☐ **(BY PERSONAL SERVICE)** By causing such document(s) to be delivered by hand, as addressed by delivering same to First Legal Services with instructions that it be personally served.
- ☒ **(BY ELECTRONIC MAIL)** By transmitting such document(s) electronically from my e-mail address, emi.wakiya@nelsonmillins.com at Nelson Mullins Riley & Scarborough LLP, to the person(s) at the electronic mail addresses listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **April 10, 2019**, at Torrance, California.


Emi Wakiya

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